S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

JOHN E. F. GERLACH,

Plaintiff/Counter Defendant-Appellant,

v

BETHANY SANOM GERLACH,

Defendant/Counter Plaintiff-Appellee.

UNPUBLISHED
October 17, 2006

No. 262935
Wayne Circuit Court
LC No. 04-433133 DM

Before: White, P.J., and Zahra and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court order modifying the parties' consent judgment of divorce. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

After plaintiff filed for divorce, the parties entered into a settlement agreement providing for joint legal and shared physical custody of their two minor children. Although the children were to primarily reside with defendant at the marital home, the agreement included a detailed schedule specifying the amount of parenting time each party will have with the children. In addition to this schedule, the agreement contained a paragraph labeled "Parenting Schedule Conflicts," which provided:

> When the schedules of the parties' or demands of employment require either party to be unable to attend to the children during their parenting time, the party with the conflict will always ask the other party to parent and/or care for the children so as to avoid having to hire sitters or rely upon family and friends and, more importantly, so the other parent can have as much time with the minor children as possible.

At a hearing on defendant's motion for entry of judgment, defendant requested that the trial court alter the scheduling conflicts provision to specify the length of time a party must be unavailable before he or she must contact the other parent. The trial court agreed, stating that a two-hour period is reasonable. The court modified the consent judgment so that the conflict provision only applies if either party is unavailable "for a for a period of two hours or more."

On appeal, plaintiff contends that the trial court erred in modifying the agreement regarding parenting time without first conducting an evidentiary hearing or making a determination, based on clear and convincing evidence, that such a change was in the best interest of the children.

We review orders regarding parenting time de novo. *Deal v Deal*, 197 Mich App 739, 741; 496 NW2d 403 (1993). But we will not reverse such an order "unless the trial court made findings of fact against the great weight of the evidence, committed a palpable abuse of discretion, or committed a clear legal error." *Id.*

The Child Custody Act, MCL 722.21 *et seq.*, governs child-custody disputes between parents, including those concerning the allocation of parenting time. *Deal*, *supra*, 741. Under MCL 722.27a(1), courts must grant visitation in "accordance with the best interests of the child and in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent." *Mauro v Mauro*, 196 Mich App 1, 4; 492 NW2d 758 (1992). "When a modification of custody (either by changing custody or parenting time) *would change the established custodial environment of a child*, the moving party must show by clear and convincing evidence that it is in the child's best interest.[1] *Brown v Loveman*, 260 Mich App 576, 585; 680 NW2d 432 (2004)(emphasis added). A custodial environment is established if "over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort." *Id*, 595. The courts must also consider the ages of the children, the physical environment, and the inclination of the custodial parent and the children as to permanency of the relationship in determining whether there is an established custodial environment. *Id.*

In *Brown*, *supra*, 578-579 the plaintiff father filed suit to prevent the defendant mother from moving out of Michigan with their minor child. The trial court directed both parties to provide proposed parenting time schedules and adopted the one offered by the defendant. *Id.*, 581. This plan, in addition to allowing the defendant to take the child to New York, severely limited the plaintiff's parenting time. *Id.* On appeal, this Court noted that, under *Scott v Scott*, 124 Mich App 448, 450-453; 335 NW2d 68 (1983), moving a child out of the state does not result in a change in the custodial environment if the parents' right to parenting time remains the same. *Id.*, 596. But it found that the trial court's order reduced the plaintiff's parenting time from being equal with the defendant's to being approximately three months out of the year or one third as much time as the defendant. *Id.*, 596-597. The Court held that the modification of the parenting time schedule "effectively amounted to a change in [the child's] established custodial environment" and that the trial court's failure to hold an evidentiary hearing before making the order constituted clear error. *Id.*, 598. The case was therefore remanded to the trial court, with instructions for the court to conduct a hearing and "articulate its findings of fact on the relevant best interest of the child factors" and determine whether the proposed parenting time schedule is in the best interest of the minor child. *Id.*

[1] Courts make this determination based on the "best interest of the child" factors set forth in MCL 722.23.

Unlike the situation in *Brown*, there has been no change in the custodial environment in the instant case. Rather than making a de facto change in custody by significantly reducing one parent's right to visitation, the trial court's modification of the consent judgment left the detailed parenting time schedule adopted by the parties wholly intact. The sole change affects a default provision that only becomes relevant if one of the parties is unable to care for the children during their scheduled parenting time.

Further, the modification merely provides that the provision applies when the party with parenting time is unavailable for more than two hours. The earlier version did not specify a time limit. Rather than curtailing plaintiff's opportunities for parenting time, the modification provides a neutral guideline equally applicable to both parties. Although the change prevents plaintiff from invoking the conflicts provision if defendant becomes unavailable for a short time, it likewise prevents defendant from invoking it in a similar manner. Thus, the modification may have no net effect (or perhaps even favor plaintiff) on the actual parenting time enjoyed by the parties. Like a change in a child's residence that does not alter a parents' visitation schedule, the modification in the instant case does not constitute a change in the children's established custodial environment.

Because there was no change in the custodial environment, defendant did not have to establish by clear and convincing evidence that the modification was in the children's best interest. *Brown*, *supra*, 585. Consequently, the trial court did not err by failing to hold an evidentiary hearing before making the change.

Affirmed.

/s/ Helene N. White
/s/ Brian K. Zahra
/s/ Kirsten Frank Kelly